BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Diamond Wanapa I, L.P. Wanapa Energy Center	)	PSD Appeal No. 05-06
PSD Permit No. R10PSD-OR-05-01	)	

ORDER DENYING REVIEW

I. *BACKGROUND*

Before the Board is a petition filed by Mr. K.E. Thompson ("Petitioner") seeking review of a prevention of significant deterioration ("PSD") permit decision (the "Permit") issued by U.S. Environmental Protection Agency, Region 10 (the "Region") on August 8, 2005.[1] *See* Letter from K.E. Thompson to the Environmental Appeals Board (Aug. 20, 2005) ("Petition").[2]

[1] Congress enacted the PSD provisions of the Clean Air Act ("CAA" or the "Act") in 1977 for the purpose of, among other things, "insur[ing] that economic growth will occur in a manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). To that end, parties must obtain preconstruction approval (i.e., PSD permits) to build new major stationary sources, or to make major modifications to existing sources, in areas of the country deemed to be in "attainment" or "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards" ("NAAQS"). *See* CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492. NAAQS are established on a pollutant-by-pollutant basis and are currently in effect for six air contaminants: sulfur oxides (measured as sulfur dioxide ("SO_2")), particulate matter ("PM"), carbon monoxide ("CO"), ozone (measured as volatile organic compounds ("VOCs")), nitrogen dioxide ("NO_2"), and lead. 40 C.F.R. § 50.4-.12.

[2] Although the Petition is dated August 20, 2005, it was not filed with the Board until September 9, 2005. Documents are "filed" with the Board on the date they are received. Because the Permit was served by mail, the Petition is considered timely filed with the Board. *See* 40 C.F.R. § 124.20 (adding three days to prescribed 30-day time for filing a petition for review where service is by mail).

The Region filed a response to the Petition on October 18, 2005. *See* EPA Region 10's Response Brief ("Region's Response").[3] The Permit, issued to Diamond Wanapa I., L.P. ("Diamond"), would authorize the construction of the Wanapa Energy Center ("WEC"), a combined cycle electric generating facility, on land held in trust by the United States Government for the Confederated Tribes of the Umatilla Indian Reservation near Umatilla, Oregon. *See* Prevention of Significant Deterioration Permit to Construct at 1-3 (Aug. 8, 2005) (R. Exh. F-1).

Petitioner raises a total of eight issues for which he seeks review by this Board. These are: (1) The Region failed to address the human health or environmental effects of the proposed facility on "both majority and minority populations." Petition at 1; (2) The Region improperly treated emissions from nonroad heavy duty diesel engines differently than emissions from power plants such as WEC. *Id.* at 3-7; (3) The Region failed to perform a cumulative impact analysis. *Id*. at 7-8; (4) The Region improperly considered meteorological data from Spokane and Walla Walla, Washington. *Id*. at 14; (5) The Region should have treated the airshed around the proposed WEC in the same manner as a Class I or Class II wilderness or scenic area. *Id*. at 11-12; (6) The Region did not consider a Bonneville Power Administration study of regional air quality. *Id*.; (7) The Region erred in establishing the Permit's volatile organic compound emissions limitation. *Id*. at 12-13; and (8) The Region erred by failing to include permit conditions addressing emissions from nonroad heavy-duty diesel engines that will be used during construction of the proposed WEC. *Id*. at 13. For the reasons stated below, review is denied.

[3] The Region's Response is accompanied by exhibits consisting of various documents that are part of the administrative record in this matter. These exhibits will be cited as: Response Exhibit ("R. Exh.") followed by the exhibit number.

II. *DISCUSSION*

A. *Standard of Review*

In evaluating a petition for review of a PSD permit under 40 C.F.R. § 124.19(a), the Board will generally not grant review unless the petition for review establishes that the Permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. § 124.19(a); *see In re Amerada Hess Corp*., PSD Appeal No. 04-03, slip op. at 11 (EAB, Feb. 1, 2005), 12 E.A.D. ___; *In re Sutter Power Plant*, 8 E.A.D. 680, 686-87 (EAB 1999). The Board's analysis of PSD permits is guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that most permit conditions should be finally determined at the Regional level. *See In re Knauf Fiberglass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). Accordingly, for each issue raised in a petition, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a); *Amerada Hess*, slip op. at 11.

Moreover, in order to preserve an issue for appeal, the regulations require any petitioner who believes that a permit condition is inappropriate to have first raised "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the public comment period on the draft permit. 40 C.F.R. §§ 124.13, .19(a) ; *In re BP Cherry Point*, PSD Appeal No. 05-01, slip op. at 11 (EAB, June 21, 2005), 12 E.A.D. ___; *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999). The purpose of such a provision is to "ensure that the Region has an opportunity to address potential problems with the

draft permit before the permit becomes final, thereby promoting the longstanding policy that most permit decisions should be decided at the Regional level, and to provide predictability and finality to the permitting process." *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *Sutter Power Plant*, 8 E.A.D. at 687 ("The intent of these rules is to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and the permit process will have some finality."). The burden of demonstrating that an issue has been raised during the comment period rests with the petitioner - "It is not incumbent on upon the Board to scour the record to determine whether an issue was properly raised below." *Encogen*, 8 E.A.D. at 250 n.10. The Board has also frequently emphasized that petitioners must raise issues with a reasonable degree of specificity and clarity during the comment period in order for the issue to be preserved for review. *In re Carlota Copper Co.*, NPDES Appeal No. 00-23 & 02-06, slip op. at 46 (EAB Sept. 30, 2004), 12 E.A.D. ___; *New England Plating,*, 9 E.A.D. at 732; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998). On this basis, the Board has often denied review of issues raised on appeal that were not raised with the requisite specificity during the public comment period. *See, e.g., New England Plating*, 9 E.A.D. at 732-35; *Maui*, 8 E.A.D. at 9-12; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995).

Further, where the Region responds to comments when it issues a final permit, it is not sufficient for a petitioner to rely solely on previous statements of its objections, such as comments on the draft permit. Rather, a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review. *In re Newmont Nevada*, PSD Appeal No. 05-04, slip op. at 58 (EAB Dec. 21,

2005), 12 E.A.D. ___; *Steel Dynamics*, 9 E.A.D. at 744; *In re LCP Chems*., 4 E.A.D. 661, 664 (EAB 1993).

B. *Petition for Review*

1. *Majority and Minority Populations*

Under the heading "FACTS," the Permit states, in part:

> WEC will be located in the vicinity of minority populations, and EPA is responsible for addressing environmental justice within these communities pursuant to Executive Order 12898. EPA is required to identify and address disproportionately high and adverse human health or environmental effects, if any, on minority populations due to this PSD permit approval. In February 2004, EPA conducted a public meeting in Hermiston, Oregon to educate the public about WEC and the PSD permit process so as to promote meaningful involvement of the community.

Permit at 4, Fact 1 (R. Exh. F-1). According to the Petition, the above-quoted "fact" demonstrates that EPA failed "to address the human health or environmental effects of both majority and minority populations." Petition at 1.

Because this issue was reasonably ascertainable by Petitioner but nonetheless was not raised during the comment period on the draft permit, it was not preserved for review with this Board. *See In re BP Cherry Point*, PSD Appeal No. 05-01, slip op. at 14 (EAB June 21, 2005), 12 E.A.D. ___. Review is therefore denied. As previously stated, the burden is on the petitioner to demonstrate that an issue was raised during the comment period. *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999). The requirement that an issue must have been raised during the comment period in order to preserve it for review is not an arbitrary hurdle placed in the path of potential petitioners. *See In re City of Marlborough*, NPDES Appeal No. 04-13, slip

op. at 13 n.13 (EAB Aug. 11, 2005), 12 E.A.D. ___; *BP Cherry Point*, slip op. at 14-15, 12 E.A.D. ___. Rather, the requirement serves an important function related to the efficiency and integrity of the overall administrative permitting scheme. *Marlborough*, slip op. at 13 n.13. The intent of the rule is to ensure that the permitting authority first has the opportunity to address permit objections, and to give some finality to the permitting process. *Id*; *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). As we have explained, "[t]he effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Teck Cominco*, NPDES Appeal No. 03-09, slip op at 31 (EAB June 15, 2004), 11 E.A.D. ___ (quoting *Encogen*, 8 E.A.D. at 250). "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994).

Moreover, even had the issue been raised, the Petition fails to convince us that review is warranted. The Executive Order referenced in the above-quoted portion of the permit requires federal agencies to identify and address, as appropriate, "disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority populations and low income populations in the United States * * *." Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994) ("Executive Order") at § 1-101. Apparently, the Petitioner is asserting that by fulfilling its obligations under the Executive Order, the Region has neglected the effect of the WEC on the general population. The Petition, however, provides no

support for this assertion. Indeed, the record indicates that the Region fully considered and responded to concerns raised during the public comment period regarding the impacts to human health and the environment on the area surrounding the proposed facility and concluded that the facility would not have any adverse impacts. *See* Response to Public Comments at 13-16 (Aug. 8, 2005) (R. Exh. F-2); Preliminary Technical Support Document for Prevention of Significant Deterioration (PSD) ("Technical Support Document") at 32 (Nov. 17, 2004) (R. Exh. B-2). The Petition fails to convince us that the Region's determination in this regard was clearly erroneous or otherwise warrants review.

2. *Emissions From Nonroad Diesel Engines*

Although not entirely clear from the Petition, the Petitioner appears to be arguing that the Region erred by failing to treat stationary sources of pollution, such as the proposed facility at issue in this case, in the same manner as mobile sources, such as heavy duty diesel engines. *See* Petition at 3-7. In particular, the Petition states that "[a]s long as the facility is in an EPA air quality attainment area and the individual facility does not exceed any of EPA's minimum pollutant [national ambient air quality standards ("NAAQS")], then the EPA and applicants conclude that there are no significant human, crop, or animal impacts." Petition at 3. With regard to mobile sources, however, such as heavy duty diesel engines, Petitioner asserts that "the first molecule of air pollution * * * has a quantitative impact upon human premature deaths and health." *Id*. at 3-4. Apparently, Petitioner believes that it is improper for the Region to measure the impacts of emissions from stationary sources such as WEC differently from mobile source emissions.

As the Region explained in response to this comment during the comment period: "The [Clean Air Act ("CAA")] regulates stationary sources and mobile sources differently, and EPA is required to follow the PSD permitting process for this facility under the CAA. EPA does not have the authority to ignore the PSD permitting process when issuing a PSD permit, such as this one." Response to Comments at 26. Because the Petition fails to demonstrate why the Region's response was clearly erroneous or otherwise warrants review, review is denied on this issue. *See In re Newmont Nevada Energy Investment, L.L.C.*, PSD Appeal No. 05-04, slip op. at 58 (EAB Dec. 21, 2005), 12 E.A.D. ___ (Petition may not simply repeat objections raised during the comment period). Further, to the extent that the Petition is challenging the PSD permitting regulations, this is not the appropriate forum for such a challenge.[4] *See In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001) (permit appeals are not appropriate fora for challenging regulations).

3. *Cumulative Impacts*

Petitioner asserts that the Region erred by failing to conduct a complete cumulative impact analysis before issuing the permit. Petition at 2, 7-8. In its response to comments on this issue, the Region stated:

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[4] Petitioner also appears to contend that EPA regulations restricting emissions from nonroad diesel engines have created an "emissions offset" whereby the reduction in allowable emission from these engines is used to allow greater emissions from electric generating facilities, such as the WEC. *See* Petition at 9. Petitioner apparently believes that the Region is improperly imposing stricter requirements on nonroad diesel engines than electric generating facilities. As stated above, however, because Petitioner has failed to indicate why the Region's Response to Comments regarding the regulation of stationary and mobile sources was clearly erroneous or otherwise warrants review, review is denied on this issue. *See In re Newmont Nevada Energy Investment, L.L.C.*, PSD Appeal No. 05-04, slip op. at 58 (EAB Dec. 21, 2005), 12 E.A.D. ___.

40 C.F.R. § 52.21(m) states that an ambient air quality analysis is required for each air pollutant emitted in excess of EPA's significant emission rate thresholds as delineated in 40 C.F.R. § 52.21(b)(23). In this case, an [ambient air quality impact analysis ("AAQIA")] is required for carbon monoxide (CO), nitrogen dioxide (NO_2), O_3, PM_{10}, and sulfur dioxide (SO_2). *See* [Technical Support Document ("TSD")] at p.33. If it is determined that emissions from the new source will not have a significant impact, no further analysis is required.

The AAQIA indicated that only NO_2 and PM_{10} exceeded their respective significant impact levels.[5] *See* TSD at p.43, Table 5-6. Therefore, a cumulative, or second part, full AAQIA was performed for these two air pollutants to determine compliance with NAAQS and Class II area air quality increments. Subsection 5.2.6 of the TSD provided a description of the nearby point source emissions inventory development. Mobile source emissions were determined to be insignificant and were assumed to be included in the measured background concentrations as well as fugitive dust emission and agricultural activities. Moreover, in Comment Letter - Response 7, EPA explained that emission impacts

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[5] The PSD provisions require a permit applicant to demonstrate that emissions will not cause or contribute to any air pollution that exceeds the NAAQS or that exceeds an area's maximum allowable increase over baseline concentration (ambient air increment) for any pollutant. See 40 C.F.R. § 52.21(k); see also 40 C.F.R. § 52.21(c) (ambient air increments). Ambient analysis relies in part on dispersion modeling, which considers factors such as local meteorological conditions and source-specific emission characteristics to estimate maximum ambient air quality impacts. See U.S. EPA, New Source Review Workshop Manual (Draft Oct. 1990) ("NSR Manual") at Chap. IV. (Although it is not accorded the same weight as a binding Agency regulation, the NSR Manual has been considered by this Board to be a statement of the Agency's thinking on certain PSD issues). *See Newmont Nevada*, slip op. at 9, 12 E.A.D. at ___. A permit applicant may be able to make the required demonstration either by conducting a full ambient impact analysis or by conducting a preliminary analysis demonstrating that the emissions from the proposed source will be sufficiently small to have only minimal impacts on ambient air quality. See NSR Manual at ch. IV. A full ambient impact analysis includes consideration of the emissions from the proposed source itself, as well as "the estimation of background pollutant concentrations resulting from existing sources," and emissions from "residential, commercial, and industrial growth that accompanies the new activity at the new source or modification." *Id*. at C.24-.25. If, on the other hand, the permit applicant conducts a preliminary analysis which demonstrates that the new source's contribution to ambient concentrations will be below "significant impact levels" specified in EPA guidance, the permitting authority may allow the applicant to forego the full impact analysis. See NSR Manual at C.24. Thus, "[t]he results of this preliminary analysis determine whether the applicant must perform a full impact analysis. * * * The EPA does not require a full impact analysis for a particular pollutant when emissions of that pollutant from a proposed source or modification would not increase ambient concentrations by more than prescribed significant impact levels." Id. C.24-.25

> associated with agricultural activities, mobile sources and wind blown [sic] would be captured by the representative monitoring station.
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> The results of these two analyses appear in Table 5-10 of § 5.3.3 and Table 5-11 of § 5.3.4 of the preliminary TSD. The NAAQS include representative background measurements. It should be pointed out that concentrations predicted for the air quality increment analysis are conservative (bias towards over prediction) because allowable emission rates were modeled and emission decreases or credits were not considered.
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> In sum, EPA has adequately accounted for all sources contributing to air pollution in the AAQIA. Further, the AAQIA properly contained a cumulative impacts analysis as required under the CAA and implementing regulations.

Response to Comments at 12-13 (footnote and citations omitted). Thus, the Region concluded that a cumulative AAQIA was warranted only as to NO_2 and PM_{10}, and such an analysis was performed on those two pollutants. All other pollutants from the proposed facility were determined not to pose significant adverse impacts. *Id*. Because the Petition fails to demonstrate why the Region's response to comments on this issue was clearly erroneous or otherwise warrants review, review is denied on this issue. *See Newmont Nevada*, slip op. at 58, 12 E.A.D. ___.

4. *Meteorological Data*

Petitioner argues that the Region erred by using meteorological data that were not representative of the conditions in the area of the proposed facility. Petition at 11, 14. In particular, the Petition alleges that the Region improperly "pass[ed] off Spokane and Walla's weather as similar to the Wanapa site." *Id*. at 14. The Region's Response to Comments, however, contains a lengthy discussion of this issue. *See* Response to Comments at 10-11. The Region stated, in part:

Meteorological data requirements for air quality modeling are detailed in 40 C.F.R. Part 51, Appendix W. Section 9.3 of Appendix W states that the meteorological data selected for air quality modeling should be representative of the area in terms of dispersion and transport and climatic conditions. The following factors are considered in determining whether meteorological data is [sic] representative of an area: (1) the nearness of the meteorological data collection site and the stationary source, (2) the surrounding terrain features, (3) the exposure of the meteorological collection site, and (4) the period of record of the data. Moreover, the source of the meteorological data can be representative National Weather Service (NWS) data, nearby data, or site specific data. Appendix W further states that representative NWS data is routinely used in dispersion modeling due to its availability. See also NSR Workshop Manual at C.22.

Moreover, on January 23, 2003, EPA Region 10 provided additional guidance to its four states for determining the representativeness of meteorological data when using the AERMOD Modeling System. According to this guidance, representativeness is largely contingent upon whether the meteorological data collection site and the source location are equivalent or similar in land uses (or surface roughness lengths) given this factor's influence on wind speed.

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In terms of transport and dispersion, wind direction, wind speed and surface roughness length are the variables that have the greatest influence and most sensitivity on predicted concentrations. Hence it was important to determine that these three meteorological variables at the measurement site (Umatilla Army Depot) would be representative of the source location. (WEC). Although cloud cover (Walla Walla) and upper-air data (Spokane) are important, they are not as influential or sensitive as the above-stated variables for predicting ambient air pollution concentrations.

The affect of distance and local terrain features between Umatilla Army Depot and WEC were considered indirectly. In addition, because five years of consecutive hourly meteorological observation were modeled, EPA believes that the worst-case meteorological conditions have been captured in the generated data set even though cloud cover from Walla Walla and upper data from Spokane were used. In the five-year meteorological database, 42,445 hours out of 43,824 hours were generated and used in the model to calculate concentrations. The balance of time (approximately 1,400 hours) was not modeled due to either missing data or indeterminate wind direction observations.

It has been EPA's policy to allow the use of upper air data collected at the nearest NWS station. This is due largely to the cost that would be incurred to collect this data.

> In sum, based on its technical expertise and best professional judgment, EPA has determined that the meteorological data from the Umatilla Army Depot, Walla Walla, and Spokane is adequately representative of the project location.

Id. The Region's Response to Comments also references the Region's Technical Support Document. That document states, in part:

> Surface and upper air meteorological data are needed by the AERMOD Dispersion Program to characterize transport and dispersion of air pollutants contained in an exhaust plume. Hourly observations measured at * * * the National Weather Service (NWS) Walla Walla, WA station, and upper air data collected at Spokane, WA were obtained and used in the AERMOD Modeling System for this purpose. The meteorological data collected at these * * * locations are considered adequately representative of the project location * * *.

Technical Support Document at 36 (R. Exh. B-2). Because the Petition fails to demonstrate that the Region's response to comments on this issue was clearly erroneous or otherwise warrants review, review is denied on this issue. *See Newmont Nevada*, slip op. at 58, 12 E.A.D. ___.

5. *Evaluation of Impact Area*

The Petition asserts that the Region has treated the airshed in the area surrounding the proposed facility "as a pollutant throwaway or pollutant dumping airshed without the same rights to clear skies and unlimited visibility as humans within Class I and II wilderness or scenic areas." Petition at 11. The Petition suggests that Umatilla County's airshed should be treated in the same manner as a wilderness or scenic area.[6] As the Region explained in its Response to

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[6] Areas subject to PSD review are generally classified as Class I or II. "Class I areas are areas of special national or regional value from a natural, scenic, recreational, or historic perspective." U.S. EPA, New Source Review Workshop Manual (Draft Oct. 1990) ("NSR Manual") at E.1. These areas must be specifically designated as Class I. Several national parks and wilderness areas were designated Class I areas by statute. CAA § 162(a), 42 U.S.C. § 7472(a). All other areas within the PSD program were classified as Class II. CAA § 162(b), 42 U.S.C. § 7472(b). Class II areas are designed to "accommodate normal well-managed

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Comments, however, "[t]he area around WEC, like most other areas within the United States, is classified as a Class II area. EPA has reviewed WEC's impacts upon the surrounding area consistent with the PSD requirements for Class II areas." Response to Comments at 28-29. Because the Petition fails to demonstrate that this response was clearly erroneous or otherwise warrants review, review is denied on this issue.[7] *See Newmont Nevada*, slip op. at 58, 12 E.A.D. ___.

6. *Bonneville Power Administration Study*

Petitioner argues that the Region failed to consider a 2001 modeling study by the Bonneville Power Administration. Petition at 11-12; *see* Phase I Results, Regional Air Quality Modeling Study, Bonneville Power Administration (Aug. 1, 2001) ("BPA Study") (R. Exh. A-3). According to the Petition, the BPA Study shows significant air quality impacts in the area of the WEC. However, because this issue was reasonably ascertainable[8] but not raised during the comment period, it was not preserved for Board review. *See BP Cherry Point*, slip op. at 14. Moreover, even if the issue had been raised, the Petition fails to explain how the data in the BPA Study should have affected the Region's permit determination; nor does Petitioner demonstrate

[6](...continued)
industrial growth." NSR Manual at C.5.

[7] Moreover, to the extent that the Petition is challenging the PSD permitting regulations or the appropriate designation, this is not the appropriate forum for such a challenge. *See In re Tondu Energy Co.*, 9 E.A.D. 710, 715-16 (EAB 2001).

[8] Contrary to the Petitioner's suggestion, the BPA Study was part of the administrative record in this matter and was available for review during the public comment period. *See* Certified Index to the Administrative Record (Oct. 17, 2005) at 1; Region's Response at 12-13.

that the Region's permit determination was clearly erroneous or otherwise warrants review. Under these circumstances, review is denied.

7. *Volatile Organic Compound Limitation*

Petitioner objects to the permit's volatile organic compound ("VOC") emissions limitation of 99 tons per year ("tpy"). *See* Petition at 12-13; Final Permit at 6, 14 (R. Exh. F-1). Petitioner calculates that if the proposed facility were to operate 365 days per year, VOC emissions would be approximately 345 tpy. Petition at 12. Petitioner questions whether any "competent business is going to spend $300 million on a carbon based thermo power plant and only operate the facility for *28.6%* of the year[.]" *Id*. at 13. Because this issue was reasonably ascertainable but was not raised during the comment period, however, it was not preserved for review[9]. *See BP Cherry Point*, slip op. at 14. Review is therefore denied.[10]

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[9] Although Petitioner raised a question concerning the VOC limit in commenting on the draft permit, he simply sought an explanation for the development of the 99 tpy limitation. *See* Opposition to the EPA's Wanapa Energy Center Permit (Dec. 17, 2004) at 32 (R. Exh. C-1). The Region's Response to Comments provided such an explanation (*see* Response to Comments at 29) and Petitioner has failed to explain why the Region's explanation was clearly erroneous or otherwise warrants review.

[10] Moreover, as the Region states in its Response:

> The amount of time that the Proposed Project remains in operation per year is a business decision that will be made by Diamond, not a permitting decision made by EPA. If the Proposed Project exceeds [the VOC] emissions limit, then [the facility] will be in violation of a condition of the permit and may be subject to an enforcement action.

Region's Response at 14. We note further that it was Diamond itself that requested the VOC emissions limit. *See* Permit at 5 (stating that Diamond requested that EPA limit annual VOC emissions to 100 tpy and that, absent this limit, WEC's potential to emit VOC's would be 345 tpy).

Petitioner also asserts that the Permit does not contain any monitoring process to ensure that WEC will meet the VOC emissions limitation. Petition at 2. Because it does not appear that this issue was raised during the comment period, however, it was not preserved for review with this Board. *See BP Cherry Point*, slip op. at 14. Review is therefore denied on this issue.[11]

8. *Emissions During Construction*

According to the Petition, the Region failed to address "the hundreds of nonroad [heavy-duty diesel engines] that will be utilized to 'construct' the Wanapa Energy Center and all its associated service components." Petition at 13. Because this issue was reasonably ascertainable but was not raised during the comment period, however, it was not preserved for review.[12] *See BP Cherry Point*, slip op. at 14.

III *CONCLUSION*

For the foregoing reasons, the Petition for Review in the above-captioned matter is denied in all respects.[13]

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[11] Moreover, contrary to Petitioner's suggestion, the Permit requires that WEC demonstrate continuous compliance with the VOC emissions limitations by calculating emissions using procedures specified in the permit. *See* Permit Condition 15.2 (R. Exh. F-1). Should WEC fail to demonstrate compliance with the Permit's VOC emissions limit, WEC would be subject to an enforcement action.

[12] Moreover, as the Board has previously stated, the Clean Air Act expressly excludes from the PSD permitting requirements emissions resulting directly from a nonroad engine or a nonroad vehicle. *In re Cardinal FG Co.*, PSD Appeal No. 04-04, slip op. at 24 (EAB Mar. 22, 2005), 12 E.A.D. ___; CAA § 302(z), 42 U.S.C. § 7602(z).

[13] We recognize that the Petitioner is not represented by legal counsel and, as in previous cases, we have therefore endeavored to construe his objections liberally so as to identify the

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